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ETNO Reflection Document on the Practical Application of the New B2B Place of Supply Rules applicable from 2010

Introduction

ECOFIN adopted a VAT Package of proposals on 12th February 2008 which will bring in some changes in the way VAT is accounted for in Member States, principally with effect from 1st January 2010.
Chief amongst those changes will be that B2B supplies will be taxed under a general reverse charge so that when services are supplied cross border, and when supplier and recipient are in business, the VAT will be taxed according to where the recipient (customer) is established. ETNO welcomes the change to the general reverse charge principle but considers that some issues arise as a result of this which requires further guidance from the Commission to ensure a smooth and harmonised implementation of the new rules. In this paper, ETNO seeks to identify those issues and to make recommendations on how best to practically deal with those issues.

The New Reverse Charge Rules

From 1st January 2010, Article 44 of the VAT Directive 2006/112/EC will state the following:-

"The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides"

This means that cross border services will be taxable first and foremost at the customer's establishment, or where this is not possible, alternatively at a fixed establishment or permanent address or residency.

In addition, Article 196 will also apply from the same date:-

"VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied by a taxable person not established within the territory of the Member State"

This means that the responsibility for declaring and remitting the tax in B2B cross border supplies of services is shifted to the customer – i.e. the reverse charge applies wherever the customer is identified for VAT purposes.

Additional Rules

From 1st January 2010, Article 43 will also apply:-

"For the purposes of applying the rules concerning the place of supply of services:

1. *A taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him*
2. *A non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person"*

This identifies that a VAT registered person is a taxable person for reverse charge purposes, regardless of his business and non-business status.

In addition, Article 192a will also apply from the same date:-

"For the purposes of this Section, a taxable person who has a fixed establishment within the territory of the Member State where the tax is due shall be regarded as a taxable person who is not established within that Member State when the following conditions are met:

a. *He makes a taxable supply of goods or of services within the territory of that Member State;*
b. *An establishment which the supplier has within the territory of that Member State does not intervene in that supply."*

This means that 'establishment' becomes predominantly important for taxation purposes.

Issues arising from the new rules

Article 43

1. How does a supplier prove that his customer is a taxable person in the EU? Is it intended that suppliers use the VIES verification procedure as evidence of taxable status? What should a supplier do if his customer is a taxable person in more than one location?
2. How should suppliers treat cross border supplies within the EU to non-businesses entities which are nevertheless registered for VAT (e.g. government departments)? Again, is it intended that the VIES verification procedure should provided 'evidence' of taxable status?

3. Do EU suppliers need to prove that their non-EU customers are business customers? If so, how are they to do this?
4. Fundamentally there appears to be the intent to form a stronger link between the VAT number and the concept of 'taxable person'. Does the Commission intend there to be an absolute link between the two so that a VAT registration in a Member States equates to taxable person status in that Member State?
5. If a service is provided to more than one customer VAT registered entity, which entity (supplier and/or customer) should account for the VAT?
6. In global contracts involving assignments lying in many customer countries, where is the place of taxation?
7. Where a vendor is established outside the EU but presently makes supplies to EU consumer customers, is the non-EU vendor required to ascertain instances where a B2B supply may be made and obtain his customer's VAT number to support the fact that he is not making a B2C supply?

Article 44

1. What do the words "acting as such" mean in the first sentence of Article 44? Under Article 43 a taxable person receives any service as a taxable person, so would not need to 'act as such', unless this has special meaning.
2. What is meant by the words "provided to a fixed establishment"? What defines this – is it for example the contract, the place where work is actually performed or where the benefit or use of the services accrue? (Note, the same question is also relevant for Article 45: "provided from a fixed establishment"?)
3. Can 'establishment' be defined? Is it, for example, the place where central decisions and central management take place (i.e. the Planzer principle)?

Article 192a

1. What does "*An establishment which the supplier has within the territory of that Member State does not intervene in that supply"* mean?
2. Does Article 192a limit the normal principles relating to establishments regarding force of attraction? For example, where vendors have multiple establishments, does the 'force of attraction' principle operate to indicate where a supply is made from?

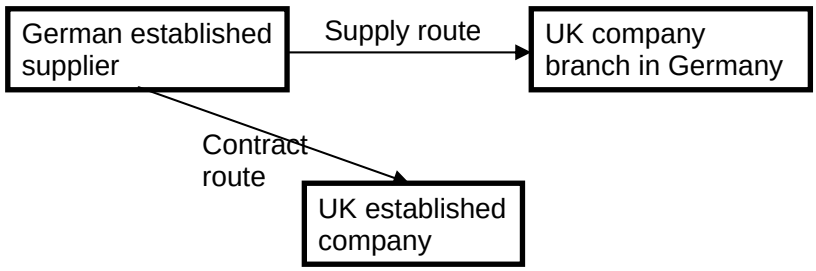
ETNO position on issues arising from the new rules

1. Establishment

ETNO believes that the guiding principle to be used in identifying the place of taxation in cross border situations involving more than one establishment of the supplier and customer should be where economic benefit and costs are taken or received, and not where any use and enjoyment takes place, and also not to be referenced according to where human and technical resources are present. This means if supplier A provides services to a branch of customer B but those services are

contracted with the head office of customer B and paid by that head office in a different state, then the head office - and not the branch - should account for the reverse charge VAT. This principle could also protect a non-EU supplier from being inadvertently sucked into EU tax net. Part of the principle is that there can only be one supply and therefore only one place of supply which, ETNO believes, is determined by the contractual route. The contractual route determines where the risks and rewards lie which in turn determines where the economic benefits are taken.
It follows from the principle that the services being supplied cannot be 'looked through' to identify where actual use and enjoyment takes place, except for services which are actually used and enjoyed outside the EU.

ETNO strongly recommends that the Commission provides clear guidance on this point because unless this is clear conflicts will arise between Articles 44 and 196, as illustrated by the following example:-



Under Article 44, place of supply is Germany, because the services are provided to a fixed establishment of the UK company in Germany.
Under Article 196, payment of VAT is required by the UK established company.
VAT is thus brought to account in two countries, which cannot be correct. Under ETNO's proposals, the economic benefit test would mean that the UK established company determines the place of supply and the payment of the VAT.

2. Recapitulative statements

ETNO questions the value of recapitulative statements and would urge the Commission to satisfy businesses that the information that is provided on the statements is properly used in the detection and prevention of fraud, because this is not evident in the current statements which are provided for the movement of goods.
ETNO desires that the same information that is presently provided on existing statements be used for services, to reduce the burden on businesses in line with the Lisbon agreement.
ETNO requests that guidance be provided on values of supplies to be entered on the statements, because particularly with services, it is probable that a seller's value will conflict with the value entered in a purchaser's records. Unless this is resolved, ETNO considers that such apparent discrepancy will give rise to queries and increase the compliance burden and at the same time reduce the impact on fraud detection and reduction.